5-14-2009

State v. Meier Appellant's Brief Dckt. 35555

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JOHN SCOTT MEIER, Defendant-Appellant.	)	NO. 35555 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature of the Case

After being convicted of felony possession of sexually exploitative material, John Meier filed a motion for the return of property that was taken as a result of a probation search. The property at issue was unrelated to the charge that Mr. Meier pleaded guilty to; and, as part of the plea agreement, the State waived the right to bring any charges related to the property, which the State believed to have been stolen. After holding a hearing and receiving affidavits from loss prevention officers claiming the property was stolen from various stores, the district court denied Mr. Meier's motion for the return of his property. Mr. Meier timely appeals from the district court's denial of his motion for the return of his property.

Statement of the Facts and Course of Proceedings

Police were investigating John Meier on allegations that he was involved in thefts from local businesses. (12/8/06 Tr.[1], p.6, L.10 – p.7, L.17.) As part of that investigation, police searched a storage unit rented by Mr. Meier pursuant to a condition of his probation that waived his Fourth Amendment rights against searches. (12/8/06 Tr., p.6, Ls.20-23; 4/24/08 Tr., p.39, L.22 – p.40, L.7.) Inside the storage unit, police found a

[1] In this case, the Idaho Supreme Court has entered an order taking judicial notice of the underlying record in Idaho Supreme Court Case No. 34261, *State v. Meier.* (35555 R., pp.6-7.) Because there are multiple transcripts of proceedings, both in Idaho Supreme Court Case No. 34261 and in Idaho Supreme Court Case No. 35555, citations made to the transcripts of proceedings are made herein with reference to the date on which the proceedings occurred. Additionally, citations to the clerk's record will be made with reference to the Idaho Supreme Court case number under which the clerk's record was prepared.

briefcase that contained numerous pictures of children that were partially undressed and that appeared to be engaged in sexual activities. (12/8/06 Tr., p.7, L.18 – p.8, L.13; p.22, L.6 – p.23, L.20.) They also obtained a home movie showing Mr. Meier engaging in sexual acts with a young boy, and other video footage of naked children. (12/8/06 Tr., p.17, L.1 – p.21, L.9.) The search also apparently uncovered numerous items that the State believed were stolen property, which were also seized. (34261 R., pp.58-79.)

Mr. Meier was charged with three counts of felony possession of sexually exploitative material. (R., pp.21-22.) The State subsequently filed a second information alleging that Mr. Meier was a persistent violator and requesting sentencing as such under IC § 19-2514. (R., pp.27-28.) Mr. Meier was never charged with any theft offense based upon the other items recovered from the storage unit. (34261 R., pp.6-7, 13-14, 21-22, 27-28.)

Mr. Meier pleaded guilty via an *Alford*[2] plea to one charge of felony possession of sexually exploitative material and to his status as a persistent violator. (3/6/07 Tr., p.9, L.15 – p.13, L.1; R., pp.45-46.) As part of the plea agreement, the State agreed not to pursue any charges relating to grand theft or forgery, nor was Mr. Meier obligated to pay any restitution for any items that were not a part of the charges that Mr. Meier was pleading guilty to. (3/6/07 Tr., p.5, Ls.19-24; 11/29/07 Tr., p.10, Ls.14-16.) Specifically, "in exchange for [Mr. Meier's] guilty plea, the State is not going to file any grand theft charges or additional charges against him for crimes *allegedly* committed against Home

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970), permits a defendant to enter a guilty plea to the charged offense despite maintaining his or her innocence of the crime.

Depot or Lowe's."[3] (3/6/07 Tr., p.5, Ls.9-13.) (emphasis added.) But the State was free to make any sentencing recommendation to the court. (3/6/07 Tr., p.6, Ls.11-18.)

The district court imposed a fixed life sentence. (5/1/07 Tr., p.33, L.21 – p.35, L.9; R., pp.45-46.) Mr. Meier timely appealed and challenged the sentence executed by the district court.

While the direct appeal of his sentence was pending, Mr. Meier filed a motion for the release of property pursuant to I.C.R. 41.1, along with an itemized list of the property that he was requesting that the State return. (34261 R., pp.52-79.) The State objected to Mr. Meier's motion, and provided an unsworn account of the underlying circumstances of the original search, which was apparently a search conducted pursuant to a Fourth Amendment waiver that was part of Mr. Meier's probation agreement. (35555 R., pp.12-18.) The State alleged that the property Mr. Meier was seeking was stolen, and that Mr. Meier had waived the right to assert any interest in this property as part of the plea agreement. (35555 R., p.17.)

At the hearing on Mr. Meier's motion, the district court articulated its belief that Mr. Meier bore the burden of establishing that he was the rightful owner of the property that he was seeking, although the court did note that there was a *prima facie* factual indication of his possessory interest because the property was in his possession at the time it was taken by the State. (4/24/08 Tr., p.7, Ls.7-17.) Mr. Meier testified that he had rented the storage unit where the property was taken from, and that all of the property taken was his. (4/24/08 Tr., p.9, L.22 – p.10, L.16, p.11, Ls.3-5, p.18, L.23 –

[3] This Court may wish to note that, since there was never any complaint or information charging Mr. Meier with a theft offense, there does not appear to be any legal allegation that this theft occurred. (34261 R., pp.6-713-14, 21-22, 27-28.)

p.19, L.9.) He further explained that he was employed in the construction trade, and also installed car stereos, and that the items taken were personal tools that he used in his employment. (4/24/08 Tr., p.11, L.23 – p.12, L.25.)

The district court asked the State whether there was ever a warrant issued in support of the initial search of Mr. Meier's storage locker from which the property at issue was seized. (4/24/08 Tr., p.39, L.22 – p.40, L.4.) The State conceded that there was no warrant and that the search was conducted pursuant to Mr. Meier's Fourth Amendment waiver that was part of the terms and conditions of his probation. (4/24/08 Tr., p.40, Ls.5-7.)

The district court then asked the prosecutor for the basis for the State's assertion that the items listed on the police inventory were stolen. (4/24/08 Tr., p.41, Ls.3-6.) The State admitted that it did not have evidence in the record at that time, but proffered what the prosecutor believed that she could show at a later time. (4/24/08 Tr., p.41, Ls.7-10.) This included that two other people believed to have been involved in the alleged theft were ordered to pay restitution, there was a videotape of "people coming and going" who were alleged to have used receipts to return stolen property in exchange for money, and loss prevention officers from the stores identified the property as coming from their stores. (4/24/08 Tr., p.41, L.11 – p.42, L.1.)

The State also argued that, when it waived the right to bring any charges related to the alleged thefts, Mr. Meier had somehow admitted that the property was stolen or otherwise waived a claim of ownership to this property. (4/24/08 Tr., p.42, L.3 – p.43, L.3.) The district court disagreed and found that Mr. Meier made no waiver of a claim to the property as a part of his plea. (4/24/08 Tr., p.43, L.4 – p.44, L.15, p.53, Ls.21-25.)

Given that the State did not have evidence at the time of the hearing to support its assertion that the property at issue was stolen, the district court continued the matter in order to give the State the opportunity to provide that evidence. (4/24/08 Tr., p.54, L.21 – p.55, L.7.) The court also indicated that it would provide Mr. Meier time to respond to the State's evidence once it was submitted. (4/24/08 Tr., p.57, Ls.2-3.)

The State filed with the district court affidavits from loss prevention officers from Home Depot, Lowes, and Builder's Lighting. (Affidavit of Josh Toulouse, pp.1-15; Affidavit of Victor Rodriguez, pp.1-7; and Affidavit of Stewart Reynolds, pp.1-3; Augment.[4]) The substance of these affidavits is virtually identical. Each contains a recitation of the name of the affiant, his affiliation with a store, that the affiant was contacted by the Boise Police Department, and that the affiant visually inspected and identified various items of property listed on the attached police inventory list as being stolen from their store as part of a refund scheme. (Affidavit of Josh Toulouse, pp.1-15; Affidavit of Victor Rodriguez, pp.1-7; and Affidavit of Stewart Reynolds, pp.1-3.) None of the affidavits provides information regarding how the affiants determined that the property visually inspected and listed on the invoice sheet was the property of their store, or what information supported the affiants' conclusions that the property was stolen. (Affidavit of Josh Toulouse, pp.1-15; Affidavit of Victor Rodriguez, pp.1-7; and Affidavit of Stewart Reynolds, pp.1-3.)

[4] Mr. Meier has sought to augment the record on appeal in this case with the affidavits of Josh Toulouse, Victor Rodriguez, and Stewart Reynolds though a motion to augment that is filed concurrently with Mr. Meier's Appellant's Brief. For ease of reference, the pages of the affidavits and attached invoices have been hand-numbered consecutively.

After the State submitted affidavits from the affiants employed by Lowes, Home Depot, and Builder's Lighting, Mr. Meier filed a response in which he asserted that these affidavits were conclusory and that they did not offer specific facts in support of the conclusion that the items were stolen from these stores. (35555 R., p.21.) Mr. Meier also requested an order from the district court for production of several receipts from these stores which indicated many of the items of property in dispute may have been purchased. (35555 R., pp.21-23.) He requested copies of these receipts in order to provide further proof that he was the rightful owner of the property. (35555 R., pp.21-23.) The State responded that the affidavits were not conclusory because each of the affiants swore that they visually inspected the property at issue and identified them as stolen. (35555 R., pp.26-27.)

The district court denied Mr. Meier's motion for the return of his property. (35555 R., pp.29-31.) The court found that, after reviewing Mr. Meier's testimony and affidavit, and the affidavits of the loss prevention officers provided by the State, the true owners of the property were Lowes, Home Depot, and Builder's Lighting. (35555 R., p.30.) Although one of the affidavits of the loss prevention officers omitted a claim of ownership to several items of property listed on the police invoices, the district court found that this was an inadvertent omission. (35555 R., p.30.) As a component of this finding, the district court found that Mr. Toulouse had referenced three pages of inventory and "[t]here were actually 34 items listed on the final three pages," as opposed to the 29 items that were listed in the affidavit of Josh Toulouse. (35555 R., p.30.) In reality, there were *four* additional pages attached to the affidavit of Josh Toulouse, three of which indicated 29 items and one of which listed five. (Affidavit of

Josh Toulouse, pp.12-15.) Based on the district court's erroneous calculation of the number of pages attached to Mr. Toulouse's affidavit, the court excused the State from any obligation to provide additional evidence regarding the ownership of the omitted items because the court found that the reference to three additional pages would subsume all of the items on the attached police inventory. (35555 R., pp.30-31.)

Mr. Meier timely appeals from the district court's order denying his motion for the return of his property.

ISSUE

Did the district court abuse its discretion when it denied Mr. Meier's motion for the return of his property?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Meier's Motion For The Return Of His Property

A. Introduction

Idaho Criminal Rule 41(e) applies to a defendant's motion for the return of property that has been taken by the State as the result of a search and seizure. While no case law in Idaho delineates the burdens of proof for such actions and other applicable legal standards for I.C.R. 41(e), case law interpreting the federal counterpart to this rule makes clear that, when no charges are pending regarding the property at issue, the burden is on the State to demonstrate that the movant is not entitled to the property. The district court in this case improperly shifted the burden to Mr. Meier, and therefore abused its discretion.

Additionally, the evidence provided by the State in the form of affidavits was too conclusory to be of evidentiary value in determining the ultimate issue of ownership of, and entitlement to, the property in dispute. As such, the district court's finding that, "the various stores are the true owners of the personal property based upon the affidavits of the loss prevention officers," was clearly erroneous because it was not supported by substantial and competent evidence.

Finally, the district court abused its discretion when it relieved the State of its evidentiary burden of proving that Mr. Meier was not entitled to five items of property that were omitted in their entirety from any claim of ownership in the affidavits.

B. Applicable Law

As an initial matter, there appears to have been some confusion in the underlying proceedings in this case as to which statute or court rule governs the nature of the proceedings where a defendant seeks the return of property that was seized by the State in the course of a criminal investigation. While the district court relied, in part, on the provisions of I.C. § 19-3801 and I.C. § 19-3807, a review of the text of these statutes demonstrates that they are not applicable under the facts of this case. (11/29/07 Tr., p.5,Ls.18-22; 35555 R., p.29.) Idaho Code § 19-3801 only applies to cases where there is an information or charge that has been filed in connection with the property. I.C. § 19-3801. And Idaho Code § 19-3807 only applies to cases in which the defendant has been convicted of a felony and the evidence is contraband. I.C. § 19-3807. Neither predicate circumstance is present in this case. Moreover, a review of the chapter in which these statutes are situated indicates that these statutes apply where there has been a specific allegation that the defendant has committed theft offense. *See* I.C. §§ 19-3801 – 3807. As has been noted, Mr. Meier has never been charged with a theft offense, and the State has waived the right to ever bring such an allegation against Mr. Meier as part of the plea agreement in this case. (3/6/07 Tr., p.5, Ls.9-13; 34261 R., pp.6-7, 13-14, 21-22, 27-28.) Therefore, to the extent that the district court was acting in reliance on these provisions, the district court's reliance was misplaced.

Mr. Meier's motion for the return of his property was brought under the rubric of I.C.R. 41.1. (34261 R., p.56.) The State addressed Mr. Meier's contentions as a motion for return of property under I.C.R. 41(e). (35555 R., p.15.) However, this Court has recognized that, with regards to motions, it is the substance of the relief sought, and

not the label attached to the motion, that controls the analysis. *See, e.g., Howard v. FMC Corp.*, 98 Idaho 465, 471, 567 P.2d 10, 16 (1977) (the title of a legal document is not controlling as to its legal effect); *Anderson v. Springer*, 78 Idaho 17, 22, 296 P.2d 1024, 1027 (1956) (the character of a pleading is determined by its contents and not by the name by which it is called); *Ade v. Batten*, 126 Idaho 114, 116 n.1, 878 P.2d 813, 815 (Ct. App. 1994). In this case, it is apparent that, given the nature of Mr. Meier's request for relief, Idaho Criminal Rule 41(e) would apply.

Idaho Criminal Rule 41.1 deals with the return of exhibits, and its provisions deal with reclaiming exhibits offered or admitted into evidence in connection with a criminal action that has been commenced by the State. I.C.R. 41.1. Again, no criminal action was ever commenced against Mr. Meier in connection with the property at issue in this appeal. However, Idaho Criminal Rule 41(e) applies where the party seeking the return of the property is a party aggrieved by a search and seizure undertaken by the State. I.C.R. 41(e). This is the set of circumstances under which Mr. Meier sought the return of his property. As such, the provisions of I.C.R. 41(e) apply to the district court's decision to deny Mr. Meier's motion for the return of his property.

C. Under Applicable Legal Standards, The District Court's Denial Of Mr. Meier's Motion For The Return Of His Property Was An Abuse Of Discretion

There does not appear to be case law in Idaho specifically discussing the burdens of proof and applicable legal standards when a defendant seeks the return of property that was seized pursuant to a criminal investigation on a charge that was either

never filed or was subsequently dismissed.[5] However, because Idaho Criminal Rule 41(e) is substantially the same as Federal Rule of Criminal Procedure 41(g), federal cases discussing this provision provide substantial guidance for this Court.[6] *See, e.g., Campbell v. Kildew*, 141 Idaho 640, 646, 115 P.3d 731, 737 (2005); *State v. Carrasco*, 117 Idaho 295, 298, 787 P.2d 281, 284 (1990).

"A district court has jurisdiction to entertain motions to return property seized by the government when there are no criminal proceedings pending against the movant." *U.S. v. Martinson*, 809 F.2d 1364, 1366-1367 (9th Cir. 1987). The district court findings of fact pursuant to a Rule 41(e) motion are reviewed for clear error, and the court's legal conclusions are reviewed de novo. *Butler Trailer Manufacturing v. State*, 132 Idaho 687, 691, 978 P.2d 247, 251 (Ct. App. 1999); *U.S. v. VanHorn*, 296 F.3d 713, 719 (8th Cir. 2002). Denial of a Rule 41(e) motion is generally proper where the defendant is not

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[5] The only decision that appellate counsel was able to locate regarding a defendant's motion for return of property under I.C.R. 41(e) deals primarily with the issue of whether there was sufficient evidence to support the district court's finding that the items requested in the motion for return of property were not actually taken by the State. *See Butler Trailer Manufacturing v. State*, 132 Idaho 687, 691-692, 978 P.2d 247, 251-252 (Ct. App. 1999). This opinion does not set forth the applicable legal standards for such motions outside of the context of its holding regarding the necessity of the district court to make a determination of what was seized by the State and noting the fact that a police inventory is important evidence in making this determination. *Id.* However, there is no dispute that the police seized the items listed on the police inventory, and therefore the ultimate holding in *Butler Trailer Manufacturing* does not appear to be of assistance in the resolution of the issues in this appeal.

[6] On December 1, 2002, F.R.Cr.P. 41(e) was redesignated as F.R.Cr.P. 41(g). *See Jackson v. U.S.*, 526 F.3d 394, 396 n.1 (8th Cir. 2008). However, this renumbering did not alter the substance of the rule. *Id.* Therefore, some of the federal case law discussing this provision of the federal rules references F.R.Cr.P. 41(e), rather than F.R.Cr.P. 41(g), where the motion for return of property was filed prior to the renumbering of the rule in 2002.

lawfully entitled to the property, the property is contraband, or if the government's need of the property as evidence in an ongoing case continues. *VanHorn*, 296 F.3d at 719.

The relative burden of proof on the parties depends on the procedural posture of the case. *Martinson*, 809 F.2d at 1369. Specifically, whether the defendant or the State bears the burden of establishing a right to possession of the property depends upon the status of the underlying criminal allegations that purport to justify the State's seizure of the property. If the motion for the return of property is filed while a criminal investigation is pending, the movant bears the burden of proving that the seizure of the property was illegal and that he or she is entitled to legal possession of the property. *Id.* However, when the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or the State has abandoned the charges and investigation, then the burden of proof shifts. *Id.* "The person from whom the property is seized is presumed to have the right to its return, and the government has the burden of demonstrating that it has a legitimate reason to detain the property." *Id; see also U.S. v. Potes Ramirez*, 260 F.3d 1310 (11th Cir. 2001); *U.S. v. Chambers*, 192 F.3d 374, 377 (3rd Cir. 1999). Part of the State's burden includes providing evidence that establishes that the property in dispute is contraband or the fruit of illegal activity. *Martinson*, 809 F.2d at 1370; *see also Merlington v. State*, 839 N.E.2d 260, 263 (Ind. Ct. App. 2005). The seizure of property from a person is *prima facie* evidence of that person's ownership of and entitlement to the property. *U.S. v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979).

The district court in this case improperly shifted the initial burden of proof onto Mr. Meier. While the district court noted that the fact that the State had taken items

from Mr. Meier's possession constituted *prima facie* evidence of his interest in the property, the court incorrectly believed that the burden was on Mr. Meier to establish that, "he is entitled to lawful possession of certain property that is in the custody of the state." (4/24/08 Tr., p.7, Ls.7-17.) Because the State had elected to not bring any charges against Mr. Meier regarding the property at issue in this appeal, and had waived the right to bring any such charges in the future against Mr. Meier, the *State bore the initial burden of proof in this case. Martinson*, 809 F.2d at 1369-1370.

Additionally, there was insufficient evidence submitted to the district court that the property at issue in this case was actually stolen by Mr. Meier. A district court judge may not rely merely on the representations of the State regarding a material issue bearing on a motion for the return of property, but must instead rely on the evidence presented. *Mora v. U.S.*, 955 F.2d 156, 158 (2nd Cir. 1992). This is reflected in the language of I.C.R. 41(e), which provides that, "The court *shall receive evidence* on any issue necessary to the decision on the motion." I.C.R. 41(e). In light of the requirement that the State present evidence in support of its contentions that the property should not be returned to the defendant, or that the property does not belong to the defendant, the prosecution's representations to the district court regarding suspicions that Mr. Meier had stolen the property are not a legitimate basis to support the district court's ruling in this case.

The remaining evidence is also insufficient to support the district court's ruling that "the various stores are the true owners of the personal property based upon the affidavits of the loss prevention officers." (35555 R., p.30.) Information contained in an affidavit may be inadequate for evidentiary purposes if the affidavit is conclusory. *See,*

e.g., State v. Johnson, 110 Idaho 516, 527, 716 P.2d 1288, 1299 (1986); *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 483, 111 P.3d 162, 168 (Ct. App. 2005); *Bickerstaff v. Vassar College*, 196 F.3d 435 (2nd Cir. 1999). And an affidavit is merely conclusory if it contains bare allegations with no indication of the affiant's factual basis for the allegation or conclusion. *Johnson*, 110 Idaho at 527, 716 P.2d at 1299. The district court may not base its decision solely on conclusory affidavits, because doing so constitutes a "mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Instead, an affidavit must include concrete particulars in support of the conclusions contained within it. *See, e.g., Bickerstaff*, 196 F.3d at 451-452. An affidavit that lacks such particulars cannot even create a genuine issue of material fact in an action, much less carry the full evidentiary burden in a case. *See Id.*

For example, the Court in *Johnson* deemed an affidavit too conclusory to have been useful for purposes of establishing probable cause for a warrant. The affidavit at issue recited that the defendant's landlord had observed "suspicious plants" in the defendant's apartment. *Johnson*, 110 Idaho at 527, 716 P.2d at 1299. The Court noted that there was no information contained in the affidavit as to why the plants were characterized as "suspicious" by the landlord, and therefore the court lacked evidence by which to determine whether the landlord had a proper basis of knowledge to support his conclusions. *Id.* There also was no description of the plants that would have permitted the court to evaluate for itself whether the plants were suspicious. *Id.*

In this case, the affidavits supplied by the State were similarly too conclusory in nature to have had evidentiary value for the district court, and therefore cannot support a finding by a preponderance of the evidence that, "the various stores are the true

owners of the property based upon the affidavits of the loss prevention officers." (35555 R., p.30.) The sum total of the information provided in the affidavits supplied by the State is as follows: (1) the name of the affiant; (2) the store that employed the affiant and the nature of that employment; (3) that the affiant was contacted by the Boise Police Department and the date of that contact; (4) that the affiant visually inspected the property; and (5) that the affiant identified the property listed on the attached invoices as being stolen from the affiant's store "in August, 2006, as part of a refund scheme." (Affidavit of Josh Toulouse, pp.1-2; Affidavit of Victor Rodriquez, pp.1-2; Affidavit of Stewart Reynolds, pp.1-2.) These affidavits are nearly identical, and use the exact same *pro forma* terminology, with the only meaningful distinction between them being the names of the affiant, the store who employs them, and what pages of the police invoice are attached to the affidavit. (Affidavit of Josh Toulouse, pp.1-2; Affidavit of Victor Rodriquez, pp.1-2; Affidavit of Stewart Reynolds, pp.1-2.)

There is nothing in the affidavits that provides the basis for each of these individuals' conclusion that the property they inspected came from their store. (Affidavit of Josh Toulouse, pp.1-2; Affidavit of Victor Rodriquez, pp.1-2; Affidavit of Stewart Reynolds, pp.1-2.) There is likewise nothing in the affidavits, or any other evidence in this case, that provides a factual basis for the bald assertion that this property had been stolen, "in August, 2006, as part of a refund scheme." (Affidavit of Josh Toulouse, pp.1-2; Affidavit of Victor Rodriquez, pp.1-2; Affidavit of Stewart Reynolds, pp.1-2.) In short, there is a complete and utter absence of any concrete, factual particulars within these affidavits that could support the district court's finding that these affidavits proved by a preponderance of the evidence that "the various stores are the true owners of the

personal property," that is at issue in this appeal. *See Johnson*, 110 Idaho at 527, 716 P.2d at 1299. (35555 R., p.30.) Instead, the district court merely ratified the conclusory assertions of the affidavits. *See Gates*, 462 U.S. at 239.

Moreover, because the search was executed as a probation search without a search warrant, there has not even been a finding of probable cause to believe that Mr. Meier had stolen any property. (4/24/08 Tr., p.39, L.22 – p.40, L.7.) Mr. Meier testified unequivocally that the property taken by the police was his own property and no one else's. (4/24/08 Tr., p.9, L.22 – p.10, L.16, p.11, Ls.3-5, p.18, L.23 – p.19, L.9.) And, the police invoices themselves list several receipts from purchases from the stores who had filed affidavits claiming ownership of the property. (35555 R., pp.23-25). As noted in Mr. Meier's Response in Support of Motion to Return Property, these receipts likely indicated that Mr. Meier had purchased these items, which is additional proof of his lawful ownership and right to the return of the property.[7] (35555 R., pp.21-22.) In short, the district court's finding that the various stores where the true owners of the property was not supported by substantial, competent evidence. As such, the district court's order denying Mr. Meier's motion for the return of his property was an abuse of discretion.

[7] While Mr. Meier requested production of these receipts in his Response in Support of Defendant's Motion to Return Property, there is no indication whether these receipts were produced. (35555 R., pp.21-22.) In absence of such an indication, Mr. Meier does not herein raise any issue regarding the withholding these receipts, as the record makes no indication whether they were or were not ultimately provided to him.

D. The District Court's Conclusion That The State Was Relieved Of Its Burden Of Proof Regarding An Adverse Claim Of Ownership To Five Of The Items Omitted From The Affidavit Of Josh Toulouse On Behalf Of Home Depot Was An Abuse Of Discretion

Josh Toulouse provided an affidavit on behalf of Home Depot in his capacity as a loss prevention officer for the store. (*See* Affidavit of Josh Toulouse, p.1.) The district court noted, in its order denying Mr. Meier's motion for the return of his property, that the affidavit provided by Josh Toulouse on behalf of Home Depot (*hereinafter*, Toulouse affidavit) omitted any claim of ownership to five items that were listed on the police inventory forms. (35555 R., pp.30-31.) While the Toulouse affidavit recites that Mr. Toulouse "visually inspected and identified twenty-nine (29) items listed on the attached three pages of property invoices and determined that they had been stolen from the Home Depot, in August 2006, as part of a refund scheme," the district court found that, "the 11th page of the material attached to the Toulouse affidavit lists five items of property which were not mentioned in the body of the affidavit." (35555 R., p.30; Affidavit of Josh Toulouse, p.2.) The district court then found that there were "*actually 34 items listed on the final three pages, and that, "[t]hose five items listed on* the third to the last page of the material attached to the affidavit appeared to have been inadvertently skipped over by the affiant." (35555 R., p.30.) But, because the Toulouse affidavit mentioned "three pages of invoices," the district court found that the affiant meant to testify as to ownership of all 34 items in the final pages of the affidavit. (35555 R., pp.30-31.) The district court then excused the State from any further obligation in providing proof of any adverse claim of ownership in the five outstanding items. (35555 R., pp.30-31.)

There are two reasons why the district court's actions were in error. First, and most important, there are actually *four* additional pages of items listed on the police inventory, and not three. (Affidavit of Josh Toulouse, pp.12-15.) The Toulouse affidavit initially recites that he inspected and identified 81 items on the first nine pages of the attached inventory sheets as being property stolen from his store. (Affidavit of Josh Toulouse, p.1.) A review of the initial nine pages of inventory attached to this affidavit indicates 81 items listed. (Affidavit of Josh Toulouse, pp.3-11.) But, there are four, and not three, additional pages of inventory that follow the initial nine. (Affidavit of Josh Toulouse, pp.12-15.)

The Toulouse affidavit only asserts that Mr. Toulouse, "visually inspected and identified twenty nine (29) items listed on the attached three pages of property invoices," *in conjunction with his claim that these items were stolen from his store.* (Affidavit of Josh Toulouse, p.2.) The first of the remaining four pages indicates items that are numbered one through ten, consecutively. (Affidavit of Josh Toulouse, p.12.) The third and fourth pages indicate items numbered eleven through twenty, and twenty-one through twenty-nine, respectively. (Affidavit of Josh Toulouse, pp.14-15.) However, the second page of the last four pages of inventory attached to the Toulouse affidavit lists five items that are not claimed anywhere within the affidavit submitted by Mr. Toulouse. (Affidavit of Josh Toulouse, p.13.) It is apparent, given the consecutive numbering of the items from one through twenty-nine, that the Toulouse affidavit is only referencing the first, third, and fourth pages of the final four pages of attached inventory. (Affidavit of Josh Toulouse, pp.2, 12, 14-15.) The second page, with five items listed on the inventory sheet, is omitted in its entirety from Mr. Toulouse's affidavit claiming a right to

return of some of the items taken from Mr. Meier as stolen property. (Affidavit of Josh Toulouse, pp.1-2, 13.)

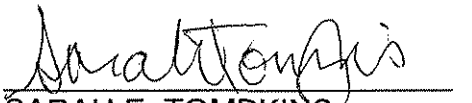
It is also worth noting that the inventory forms attached to the Toulouse affidavit only provide enough space to list ten items on each page. (Affidavit of Josh Toulouse, pp. 3-15.) In light of this, it would be impossible for three pages of this form to contain 34 items, as was found by the district court. (35555 R., p.30.) As such, the district court's finding that there were "actually 34 items of property listed on the final three pages," and that therefore Mr. Toulouse had implicitly claimed ownership to all of the items indicated on the attached inventory sheets, was clearly erroneous. (35555 R., p.30.)

Second, the district court's ruling was in contravention of the applicable legal standards that place the burden of proof on the State to establish that the defendant is not entitled to lawful possession. *Martinson*, 809 F.2d at 1369. The district court's finding that the State did not have to establish any adverse claim of ownership to the five items that were omitted from the Toulouse affidavit was based upon a clearly erroneous finding of fact, and was further against clearly applicable legal standards. As such, this conclusion was an abuse of the district court's discretion.

CONCLUSION

Mr. Meier respectfully requests that this Court vacate the district court's order denying Mr. Meier's motion for return of property, and remand this case for further proceedings.

DATED this 14th day of May, 2009.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of May, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOHN SCOTT MEIER
INMATE # 30989
ISCI
PO BOX 14
BOISE ID 83707

RONALD J WILPER
DISTRICT COURT JUDGE
E-MAILED COPY OF BRIEF

ADA COUNTY PUBLIC DEFENDER'S OFFICE
200 W FRONT ST
BOISE ID 83702

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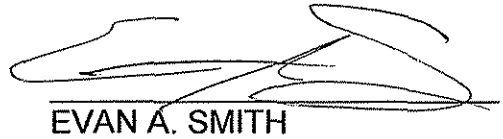

EVAN A. SMITH
Administrative Assistant

SET/eas